No. 82-2095

in the

# Supreme Court

of the

# United States

October Term, 1982

IN RE: NATIONAL AIRLINES, INC., MATERNITY LEAVE PRACTICES AND FLIGHT ATTENDANT WEIGHT PROGRAM LITIGATION

BARBARA ANN GARDNER AND SUSAN GAIL LEONARD, et al., and INDEPENDENT UNION OF FLIGHT ATTENDANTS,

*Petitioners,*

*vs.*

PAN AMERICAN WORLD AIRWAYS, INC.,

*Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the Eleventh Circuit properly found that the district court did not abuse its discretion, under 42 U.S.C. §2000 e-5(g), in determining that an injunction prohibiting Pan American World Airways, Inc. from enforcing its lawfully determined maternity leave policy against Pan American flight attendants formerly employed by National Airlines, Inc. was inappropriate in light of the particular facts of this case.

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*Petitioners,*

*vs.*

PAN AMERICAN WORLD AIRWAYS, INC.,

*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Pan American World Airways, Inc. ("Pan American") respectfully requests that this Court deny the Petition for a Writ of Certiorari, seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 700 F.2d 695.

## STATEMENT OF THE CASE AND FACTS

Pan American will not waste this overburdened Court's time with a lengthy statement of the facts in this case. Although Pan American disagrees with some of the statements set forth in petitioners' statement of the case, it does not consider these matters to be so material to the issue before this Court to require discussion.[1]

Rather, Pan American would prefer to state only the facts pertinent to the Court's exercise of its discretion:

(1) On May 17, 1977, the United District Court for the Southern District of Florida entered an order finding that National Airlines, Inc.'s ("National") maternity leave policy, requiring a flight attendant to cease flying upon knowledge of her pregnancy, violated Title VII through the first thirteen week of pregnancy, was lawful after twenty weeks of pregnancy, and was to be

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[1]Pan American would note, however, that it is not sure what petitioners mean when they state that:

> In denying the requested relief, the district court held that Pan American, as successor to National, was subject to the district court's ruling that National's flight attendant maternity leave policy violated Title VII and that Pan American would be required to remedy the effects of those practices. Pan American has acknowledged this liability.

Petition For Writ of Certiorari, p. 5. No determination of "damages" has yet been made in this case and Pan American has certainly not acknowledged that any relief is appropriate under the circumstances here.

individually applied between thirteen and twenty weeks depending upon the condition of each flight attendant in the opinion of doctors of National's choosing. *In Re National Airlines, Inc.* 434 F.Supp. 249 (S.D. Fla. 1977).

(2) On September 2, 1977, the United States District Court for the Northern District of California entered an order finding Pan American's identical maternity leave policy lawful under Title VII. *Harriss v. Pan American World Airways, Inc.*, 437 F.Supp. 413, (N.D. Calif. 1977). The Ninth Circuit affirmed the Northern District's decision. *Harriss v. Pan American World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980).

(3) Pan American acquired National on January 19, 1980. After that date, National ceased to exist. National's employees became Pan American employees. Pan American enforced its lawfully determined maternity leave policy even-handedly to all of its flight attendants.

(4) On January 13, 1982, upon petitioners' motion, the district court entered an order substituting Pan American for National in this action. Petitioners then moved to enjoin application of Pan American's maternity leave policy to former National flight attendants flying on old National flight routes. Petitioners made no showing that the old National flight routes are identical to the new Pan American routes. (They are not.) Indeed, petitioners presented no evidence to the district court in support of their motion.

(5) The district court, on February 24, 1982, entered an order denying petitioners' request for injunctive relief, considering the *Harriss* precedent.

(6) The United States Court of Appeals for the Eleventh Circuit, recognizing the "highly unusual" and "difficult" facts presented by this case, affirmed *In Re National Airlines, Inc.*, 700 F.2d 695, 699 (11th Cir. 1983). The Court of Appeals expressly considered the following factors:

A. Pan American's successful defense of its maternity leave policy against a prior Title VII challenge;

B. Pan American's complete integration of former National flight attendants into its operations;

C. Pan American's "efforts to consolidate its flight attendant system on a route-wide basis;" and

D. Pan American's "legitimate interest in treating all of its employees in an even-handed manner."

*Id.*, at 699.

(7) The Court of Appeals emphasized that "successor liability balancing is a highly fact oriented task" and specifically limited the scope of its decision to "the particular facts of this case," in finding that the district court did not abuse its discretion in denying injunctive relief against Pan American. *Id.* This petition ensued.

## REASONS FOR DENYING THE PETITION

Petitioners argue to this Court that the Eleventh Circuit created "a new rule of law" which permitted Pan American, as a successor corporation to National to

> . . . continue an employment practice found by the district court to violate Title VII of the Civil Rights Act of 1964 and for which decisions of this Court require that an injunction issue against the predecessor [National].

Petition For Writ of Certiorari, p.i.

The sole issue presented to the Eleventh Circuit, however, was whether the district court abused its discretion, under 42 U.S.C. §2000 e-5(g), in determining that an injunction prohibiting Pan American from enforcing its lawfully determined maternity leave policy against Pan American flight attendants formerly employed by National was inappropriate under the circumstances of this case.

There is no good reason for the Court to exercise its discretion in this matter. The issue presented is peculiar to these parties and of no importance to the public. The Eleventh Circuit fully considered and fairly decided it. In doing so, the Court of Appeals did not create "a new rule of law." On the contrary, its decision is consistent with the decisions of this Court and other

Courts of Appeals. The petition for issuance of a Writ of Certiorari, therefore, should be denied.[2]

**1. The Eleventh Circuit correctly decided that the doctrine of successor liability is applicable in this case.**

Petitioners contend that the Eleventh Circuit "assumed a continuing and present violation of Title VII in this case" and improperly accorded the district court the discretion to permit the "violation" to continue under the doctrine of successor liability. Petition For Writ of Certiorari, p. 8. This argument is erroneous for at least two reasons.

First, the Eleventh Circuit could not have "assumed a continuing and present violation of Title VII" because no such "violation" was before the district court at the time of its decision. The district court initially found that National's maternity leave policy violated Title VII in part. After Pan American acquired National on January 19, 1980, however, National ceased to exist. National's employees became Pan American's employees. Upon petitioners' motion, the district court substituted

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[2]As the Court stated in *Layne & Bowler Corporation v. Western Well Works*, 261 U.S. 387, 393 (1923):

> . . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals. The present case comes under neither head.

Pan American as a defendant for National. When National disappeared from the case so did its maternity leave policy. After the substitution, Pan American's maternity leave policy was before the district court. Although identical to National's policy, Pan American's maternity leave policy in its entirety had been found to be lawful under Title VII. *Harriss v. Pan American World Airways, Inc.*, 437 F.Supp. 413 (N.D. Calif. 1977). That determination was affirmed by the United States Court of Appeals for the Ninth Circuit. *Harriss v. Pan American World Airways, Inc.*, 649 F.2d 670 (1980).

Accordingly, in discussing the procedural history of this case, the Eleventh Circuit stated:

> The [district] court concluded that although Pan American would be liable as a successor corporation for money damages arising from the National lawsuit, on balance, it would be inequitable to restrain Pan American from pursuing a course of action theretofore declared valid by another federal court. This appeal followed.
>
> It should be noted at the outset that the merits of the district court's 1977 decision are not before this court for review in this appeal. We therefore express no opinion concerning the propriety of the district court's original decision finding National's maternity leave policy unlawful.

*In Re National Airlines, Inc.*, 700 F.2d 695, 697 (11th Cir. 1983).

Petitioners' characterization of Pan American's policy as "a continuing violation of Title VII," therefore, badly misconstrues the Eleventh Circuit's opinion, and ignores the approval given to Pan American's policy by the *Harriss* decisions and the fact that National no longer had any existence, much less any employees or policy, at the time the district court decided not to issue the injunction.

Second, the Eleventh Circuit's analysis and application of the doctrine of successor liability was correct. This Court has consistently refused to apply any "automatic rule of law" in determining whether a corporation that supplants another corporation, through merger or acquisition, should be affected by the labor practices and labor relationships of its predecessor. *See Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974); *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168 (1973); *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972); and *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964).

Instead, the Court has adopted a case-by-case approach and reached its decisions by striking an equitable "balance between the conflicting legitimate interests of the bona fide successor, the public, and the affected employee[s]." *Golden State Bottling Co. v. NLRB*, *supra*, 414 U.S. at 181. The court has made it clear that:

> The question whether . . . [a new employer] is a "successor" is simply not meaningful in the abstract . . . [T]he real question in each of these "successorship" cases is, on the particular

> facts, what are the legal obligations of the new employer to the employees of the former owner or their representative. The answer to this inquiry requires analysis of the interests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue whether it be the duty to recognize and bargain with the union, the duty to remedy unfair labor practices, the duty to arbitrate, etc. There is, and can be, no single definition of "successor" which is applicable in every legal context. A new employer, in other words, may be a successor for some purposes and not for others.

*Howard Johnson Co. v. Local Joint Executive Board*, *supra*, 417 U.S. at 262, n.9.

The only other Courts of Appeals which have addressed the question agree with the Eleventh Circuit that this fact specific balancing test, developed by the Court over a ten year span of labor law cases, is equally applicable to determine successor liability in a Title VII context. *See, e.g., EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086 (6th Cir. 1974); *Dominguez v. Hotel, Motel, Restaurant & Misc., Etc.*, 674 F.2d 732 (8th Cir. 1982).

The court in *MacMillan* relied, in part, upon *Howard Johnson* in holding that "Title VII *per se* does not prohibit the application of the successor doctrine, but rather mandates its application," *MacMillan*, *supra*, 503 F.2d at 1091. The *MacMillan* court also emphasized the importance of the facts of each case:

> We are of the view that the considerations set forth by the Supreme Court . . . as justifying a successor doctrine to remedy unfair labor practices are applicable equally to remedy unfair employment practices in violation of Title VII. Each case, however, must be determined on its own facts. What is required is a balancing of the purposes of Title VII with the legitimate and often conflicting interests of the employer and the discriminatee.

*Id.*, at 1090.

Petitioners' argument that the Eleventh Circuit was under some form of mandate to provide them with prospective injunctive relief is misplaced. In support of this argument, petitioners rely upon Title VII cases which are not apposite. Each involved racially discriminatory employment practices whose illegality was not subject to dispute. It would be impossible for any employer, not just a successor employer, to successfully show that an employment policy based upon race is justified as a "business necessity" or as a "bona fide occupational qualification."

Pan American's maternity leave policy, on the other hand, does not arbitrarily divide its flight attendants on the basis of race. Rather, it is based upon valid safety considerations, affects only flight attendants who become pregnant, and is challenged here only because Pan American's starting date for maternity leave is a handful of weeks earlier than the date proposed by petitioners. Moreover, Pan American successfully carried its burden of showing that its maternity leave policy was justified as both a "business necessity" and

as a "bona fide occupational justification." *Harriss v. Pan American World Airways, Inc.*, 649 F.2d 670, 674, 677 (9th Cir. 1980). Thus, the Eleventh Circuit was not, as petitioners suggest, presented with an employment policy that is facially beyond justification and for which "injunctive relief is mandatory absent clear and convincing evidence that there will be future compliance with Title VII by the defendant." Petition For Writ of Certiorari, p. 10. Petitioners' selective use of words and phrases from Title VII cases involving race discrimination simply is not a substitute for analysis of the facts demanded by this unusual case. That analysis was fairly made by the Eleventh Circuit and properly required affirmance of the district court's decision.

Petitioners contend that the balancing test employed under the doctrine of successor liability is not appropriate "when the court is faced with a continuing violation of Title VII." Petition For Writ of Certiorari p. 10. However, as Pan American has already shown, that is not the case here. There is no continuing Title VII violation because National and its policy no longer exist. There is only Pan American's maternity policy that has already been challenged under Title VII in court and has been determined to be lawful.

Petitioners also argue that "the decision of the court of appeals is directly contrary to the objectives of Title VII." Petition for Writ of Certiorari, p. 8. Again, petitioners fail to recognize the important factual distinctions between this case and the usual case of discriminatory employment practices. The decision denying the requested injunction against Pan American does not jeopardize the objectives of Title VII. Equality of employment opportunity is the objective of Title

VII. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982). Pregnant former National flight attendants did not and do not lose their jobs at Pan American as a result of its maternity leave policy. Equality of employment opportunity is not in issue here at all. Although flight attendants will incur a temporary loss of income during the term of their pregnancy, that was also true under the terms of the district court's injunction against National's policy which petitioners now seek to apply against Pan American.[3] Petitioners do not dispute the fact that, sooner or later during the term of her pregnancy, a flight attendant must stop flying in order to have her baby. Their position is that the Court of Appeals had no discretion, under Title VII, but to reject Pan American's policy, that a flight attendant must stop flying as soon as she learns of her pregnancy, and instead to grant injunctive relief based upon petitioners' preference of a starting date for mandatory pregnancy

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[3]The district court's order directed National to permit flight attendants to fly through their thirteenth week of pregnancy. National was then allowed to evaluate its flight attendants' fitness to fly, on an individual basis, between the thirteenth and twentieth week of pregnancy. Upon the twentieth week of pregnancy, National could prohibit flight attendants from flying.

Pan American's maternity leave policy requires flight attendants to stop flying upon learning that they are pregnant. The testimony below was that most women would, at least, suspect their pregnancies between six to ten weeks. Hence, the difference between the temporary loss of income that former National flight attendants experience under Pan American's maternity leave policy and the loss that they would experience under the policy permitted by the district court amounts to no more than perhaps a few weeks, hardly a matter for this Court's consideration.

leave.[4] Title VII, however, was simply not designed to force courts to choose the date that a common carrier with statutory and common law safety responsibilities of the gravest kind may require a flight attendant to go on maternity leave. That it has been so applied is history, but in the case of Pan American that attempted application resulted in an endorsement, after a lengthy trial on the merits, of its maternity leave policy under Title VII, even considering the 1978 "pregnancy amendment" to the definition of "because of sex" or "on the basis of sex," 42 U.S.C. §2000 e(k). *Harriss v. Pan American World Airways Inc., supra*, 649 F.2d at 676-77.

The Eleventh Circuit correctly followed the decisions of this Court and of other Courts of Appeals in deciding that the doctrine of successor liability is applicable on the facts here. That decision does not disserve the objectives of Title VII. Nor can it present any basis for review by this Court.

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[4]It should also be noted that petitioners seek injunctive relief for only a select group of flight attendants. This group does not include the flight attendants who were employed by Pan American at the time it acquired National. Nor does it include new Pan American flight attendants. The injunction that petitioners would have enforced is limited in its application to include only former National flight attendants who become pregnant while working for Pan American, while flying on former National routes.

**2. The Eleventh Circuit fairly applied the doctrine of successor liability; a balancing of the interests of the parties and the public demanded affirmance of the trial court's decision.**

The Court of Appeals properly applied the doctrine of successor liability in balancing the interests of the parties. Although it was "sympathetic" to petitioners' position, the Eleventh Circuit recognized the fact that Pan American has "successfully defended its policy against a Title VII challenge and has fully integrated former National attendants into its operations." *In Re National Airlines, Inc.*, 700 F.2d 695, 699 (11th Cir. 1983). The Court of Appeals also considered Pan American's "legitimate interest in treating its employees in an even-handed manner." *Id.* The Eleventh Circuit just as easily could have added other factors to support its decision: the administrative burden that an injunction affecting some, but not all, flight attendants would place upon Pan American; the negative impact on morale; the probable confusion that would result among the flight attendant employees; and the continually decreasing number of flight attendants who would be affected by the injunction.

The public interest was also served by the Eleventh Circuit's decision. The Federal Aviation Act imposes upon Pan American the duty to transport passengers with "the highest possible degree of safety." 49 U.S.C. §1421(b). Pan American's management made operational judgments to effect that stringent obligation by requiring flight attendants to cease flying while pregnant. Pan American's management alone operates the airline day-to-day and they alone are responsible for the safety of Pan American passengers:

> In sum, Pan Am, entrusted as a carrier with the lives and well being of its passengers, has the obligation at all times to employ the most highly qualified persons in positions affecting the safety of passengers. . . . The rights of individuals cannot be determined in the abstract without regard to the burdens their exercise might impose on society as a whole. The record amply demonstrates that the risk of harm to passengers and crew in the event of the failure of a flight attendant to perform to capacity in the event of an emergency is sufficiently great and the public interest in avoiding it is sufficiently compelling to justify Pan Am's method of minimizing that risk by adopting a general mandatory pregnancy policy.

*Harriss v. Pan American World Airways, Inc.*, *supra*, 437 F.Supp. at 434-35. By its judgment, *Harriss* endorsed the operational safety decisions of Pan American's management. By its action, the Eleventh Circuit properly respected that judgment and those decisions.

The Eleventh Circuit properly weighed all of these factors in the context of the "highly unusual facts of this case" and correctly found that "the balance strikes against enjoining Pan American from continuing its policy." *In Re National Airlines, Inc.*, *supra*, 700 F.2d at 699.

**3. The issue in this case is not of sufficient importance to merit the Court's review.**

As the Eleventh Circuit's opinion clearly states, it is applicable only to "the particular facts of this case." *Id.*

It does not affect anyone other than Pan American and the limited class of former National flight attendants now employed by Pan American. Moreover, the effect of the decision will last only as long as the petitioners are employed by Pan American and are capable of bearing children. Reference to Rule 19 of this Court's rules indicates that decisions of such limited effect and importance as this one do not justify issuance of a Writ of Certiorari. As the Court stated in *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1954):

> In light of this fact and the standards governing the exercise of our discretionary power of review upon writ of certiorari, we have considered anew whether this case is one in which "there are special and important reasons" for granting the writ of certiorari, as required by Supreme Court Rule 19. . . . A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually and interesting solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . . "Special and important reasons" imply a reach to a problem beyond the academic or the episodic. (citations omitted)

The Eleventh Circuit's decision was well reasoned and is, at most, "episodic" in nature. It is in harmony with the decisions of the other Courts of Appeals and consistent with the decisions of this Court. It does not present any "special and important reasons" for review by this Court.

## CONCLUSION

For the reasons set forth above, the Petition should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of Respondent's Brief In Opposition To The Petition For A Writ Of Certiorari were furnished by mail on the 1st day of October, 1983 to:

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